Supreme Court, U. S.
FILED
FEB 21 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1195

TAMS-WITMARK MUSIC LIBRARY, INC.,

Petitioner,

vs.

MUNICIPAL COURT, SACRAMENTO MUNICIPAL COURT DISTRICT, COUNTY OF SACRAMENTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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MUNICIPAL COURT, SACRAMENTO MUNICIPAL COURT DISTRICT, COUNTY OF SACRAMENTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioner, Tams-Witmark Music Library, Inc. respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California, Third Appellate District (Sacramento), filed September 29, 1975. The opinion of that court, together with the statement of facts incorporated by reference therein, which was not published, is reproduced in the Appendix to this Petition.

I.

Opinion Below and Jurisdiction

The opinion of the California Court of Appeal was filed on September 29, 1975. A timely petition for hearing to

the Supreme Court of California was denied on November 25, 1975. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3) on the ground that respondent Municipal Court's assertion of personal jurisdiction over petitioner violates petitioner's rights under Section 1 of the Fourteenth Amendment to the United States Constitution.

II.

Question Presented

Whether the California Court of Appeal was correct in holding that petitioner's licensing of some California groups to perform its copyrighted plays constituted sufficient contact with that state to support its exercise of personal jurisdiction over petitioner.

III.

Constitutional Provisions and Statutes Involved

U.S. Constitution, Amendment XIV, §1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure §410.10:

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

IV.

Statement of the Case

The State of California brought an action in respondent Municipal Court alleging that petitioner Tams-Witmark Music Library, Inc., a New York corporation, owes it $3,173.12 in taxes, interest and penalties under the California Sales and Use Tax Law, California Revenue Code Sections 6711-6715. Petitioner appeared specially and moved pursuant to California Code of Civil Procedure Section 418.10[1] to quash service of summons on the ground that respondent court lacked personal jurisdiction over it. Specifically, petitioner alleged that it is a foreign corporation which is neither present nor doing business in the State of California, and that the Due Process Clause of the Fourteenth Amendment prohibited the assertion of personal jurisdiction over it.

In support of the motion, petitioner filed the affidavit of one of its officers which established the following facts:

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[1] Subsection (a) of that statute authorizes a motion to quash, "on the ground of lack of jurisdiction of the court over" the defendant. Subsection (c) permits a defendant whose motion to quash has been denied to obtain review by filing a petition for writ of mandate. Where, as here, the appellate court has passed on the merits of such a petition, its decision is res judicata. See *People* v. *Medina*, 6 Cal.3d 484, 491 n.6, 99 Cal. Rptr. 630, 492 P.2d 686 (1972). Thus, the issue of respondent Municipal Court's power to assert personal jurisdiction over petitioner has been conclusively resolved, and the judgment of the Court of Appeal is "final" within the meaning of 28 U.S.C. §1257. See *Local No. 438, Constr. & Gen. Laborer's Union* v. *Curry*, 371 U.S. 542, 546-49 (1963).

Petitioner is in the business of licensing amateur and professional organizations to produce copyrighted musical plays in return for the payment of royalties. In connection with such licensing, petitioner makes musical scores, manuscripts and dialogue material available to its licensees on a temporary basis to enable them to produce the plays. Petitioner obtains its customers through the mailing of brochures to former customers and also advertises in a drama magazine that is received by some persons in the State of California. Petitioner does no specific advertising directed to the exploitation of the California market, it has no office or other place of business in California, and it has no salesmen, employees, representatives, or other agents who either reside in California or come to California on its behalf. There are no stores, warehouses, music libraries, or other sales outlets in California or elsewhere which contain property of petitioner. The only property which petitioner owns in California is the musical score, script and dialogue material which is in that state temporarily for use by petitioner's licensees. Petitioner transacts business with its California customers solely by telephone or through the mail, and all orders are accepted and contracts agreed to in New York by telephone or mail.[2]

This showing was not disputed by the State.[3] Nonetheless, respondent Municipal Court denied petitioner's motion on September 27, 1974. Petitioner then applied to the California Superior Court for the County of Sacramento

[2] In prior administrative proceedings the State estimated that petitioner's business with California residents has averaged $10,950.00 per year over a four year period.

[3] The State's only showing was an affidavit of the Supervisor of Collections for the Board of Equalization which described petitioner's partially-successful activities in contesting the tax before that body. However, the State has never argued that those activities provide a basis for acquiring personal jurisdiction over petitioner, and none of the courts below have relied upon them.

for a writ of mandate requiring respondent to quash service of summons on petitioner. That application again was based upon the ground that petitioner's lack of contact with the State of California made respondent's assertion of jurisdiction over it invalid.

Petitioner's application was denied by the Superior Court on November 21, 1974, and petitioner appealed to the California Court of Appeal, Third Appellate District (Sacramento). On September 29, 1975, the Court of Appeal filed a *per curiam* opinion affirming the judgment of the Superior Court. Relying upon *Union Oil Co.* v. *State Bd. of Equalization*, 60 Cal.2d 441, 34 Cal. Rptr. 872, 386 P.2d 496 (1963), a decision recognizing California's power to assess taxes with respect to property leased for use within its jurisdiction, the Court of Appeal rejected petitioner's constitutional arguments by holding that "petitioner used its product in California and had the requisite contacts with the State so as to subject itself to the State's jurisdiction."

Petitioner's timely petition for hearing by the California Supreme Court was denied on November 25, 1975.

V.

Reasons for Allowing the Writ

California Code of Civil Procedure Section 410.10 provides that:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States."

This statute makes the limits of California jurisdiction co-extensive with the requirements of the Due Process

Clause of the Fourteenth Amendment. *Belmont Industries, Inc.* v. *Superior Court*, 31 Cal.App.3d 281, 285, 107 Cal.Rptr. 237 (5th Dist. 1973). From the beginning, therefore, the issue in this case has been whether respondent Municipal Court's assertion of personal jurisdiction over petitioner violates petitioner's federal constitutional right to due process of law.

Petitioner respectfully submits that neither the rationale nor the result of the California Court of Appeal's decision can withstand scrutiny under the Fourteenth Amendment. First, it confuses a state's power to tax certain transactions with its power to acquire personal jurisdiction over foreign defendants. Under the Court of Appeal's reasoning even the most minimal use of personal property in California by a third party will require the non-resident owner of that property to come to California and defend an action for collection of taxes. Such a result is inconsistent with the traditional notions of fair play which are the essence of due process.

Second, the Court of Appeal's decision would subject every owner of a copyright to personal jurisdiction in California merely because he has a licensee in that state. This result ignores the nature of the federal copyright system and again cannot be squared with the requirements of the Due Process Clause.[4]

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[4] In its answer to petitioner's petition for hearing in the California Supreme Court the State asserted that petitioner had not prevously raised the second of these arguments and therefore was barred from doing so. This assertion is not correct. Petitioner has consistently maintained that the nature and quality of its contacts with California were such that it is constitutionally unfair for respondent court to assume personal jurisdiction over it, and those contacts are an inevitable consequence of petitioner's attempt to enjoy the benefits of its federally-protected copyrights. However the argument was phrased, it was not made for the first time to the California Supreme Court.

A. The California Court of Appeal Erred in Equating a State's Power to Tax Certain Transactions With Its Power to Assume Personal Jurisdiction Over Foreign Defendants.

In order for State courts to assert jurisdiction over a foreign corporation, that corporation must have sufficient contacts with the state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-17 (1945). The focus in each case is upon the particular acts of the defendant and whether "their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." *Id.* at 318.

Undeniably, the recent trend has been to reduce the minimum of contacts required for a constitutional exercise of personal jurisdiction over a foreign defendant. Nonetheless, this Court has cautioned that:

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of State Courts . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that state that are a prerequisite to its exercise of power over him. *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958).

In recognition of this principle, both state and federal courts have refused to exercise jurisdiction over corporations whose contacts with the state were of the type attributed to petitioner in this case. For example, merely communicating with a state's residents by telephone or

mail, although for a business purpose, has been held not sufficient to confer personal jurisdiction. See, *e.g., Arthur Ross & Peters* v. *Housing, Inc.,* 508 F.2d 562, 564-65 (5th Cir. 1975); *Misco Leasing Inc.* v. *Vaughn,* 450 F.2d 257 (10th Cir. 1971); *Interdyne Co.* v. *SYS Computer Corp.,* 31 Cal.App.2d 508, 107 Cal.Rptr. 499 (2d Dist. 1973). Similarly, the bare fact that some acts contemplated by a contract are performed in the forum state does not subject a party to that contract to its jurisdiction unless the state has a special regulatory interest in the transaction. *E.g., Agrashell Inc.* v. *Bernard Sirotta Co.,* 344 F.2d 583, 587-88 (2d Cir. 1965); *Belmont Industries, Inc.* v. *Superior Court,* 31 Cal.App.3d 281, 288, 107 Cal.Rptr. 237 (1973). Moreover, even where the consummation of a transaction has required the defendant to send an agent into a state, that act will not support personal jurisdiction if it is "of minor or accidental importance." *Galgay* v. *Bulletin Co.,* 504 F.2d 1062, 1065 (2d Cir. 1974).

In departing from these cases, the California Court of Appeal fashioned a rule of law which is unprecedented both in prior decisions and in the breadth of its potential application. That court reasoned, in essence, that the petitioner's "product" had been "used" in California and that petitioner was therefore subject to the personal jurisdiction of California courts in an action to collect taxes. This analysis ignores the differences between due process limitations upon a state's power to tax and upon its power to exercise jurisdiction over foreign defendants. Where jurisdiction to tax is the issue, the focus is upon the particular property or transaction which is sought to be taxed and the inquiry is whether it has obtained the "benefits of an ordered society" provided by the state. *Union Oil Co.* v. *State Bd. of Equalization,* 60 Cal.2d 441, 457, 34 Cal.Rptr. 872, 386 P.2d 496 (1963).

Where personal jurisdiction is the issue, the question is whether the defendant's conduct has so impinged upon the forum state as to make it fair that he be required to come there and defend his actions. See *International Shoe Co.* v. *Washington,* 326 U.S., at 316-19. Plainly, there will be many situations in which a person is associated with what might be a taxable transaction but it would be manifestly unfair to subject him to the personal jurisdiction of the California courts, merely because of such association.

So here, where the petitioner's only contact with the State of California is a copyright license with a resident of the state, it is constitutionally unfair to require it to come from New York to defend this action.

It should be noted that quashing service of summons in this case and rejecting the California Court of Appeal's erroneous rule of law will not mean that California is without remedies for collection of its taxes. Even if California courts do not have personal jurisdiction over petitioner, an out of state licensor of California, the State may require that taxes such as it now seeks to assess be collected by a party to the transaction who resides in California, viz. the licensee,[5] or it may commence an action against the petitioner in New York where petitioner has its principal place of business. The latter alternative is particularly available in this case, because the California Board of Equalization maintains an office in New York.

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[5] This was the situation in *Union Oil Co.* v. *State Bd. of Equalization,* 60 Cal.2d 441, 34 Cal.Rptr. 872, 386 P.2d 496 (1963), the decision relied upon the California Court of Appeal. There, a tax was imposed upon the use in California of personal property owned by a foreign corporation. The tax was collected, however, from the lessee of the property which did business in California.

B. By Assuming Personal Jurisdiction Over Petitioner Solely Because It Has Some California Licensees, the Court of Appeals Has Denied Petitioner Due Process of Law.

This case does not involve the usual situation of a corporation sending tangible goods or personal property into California, knowing that claims against it may arise from the use of the property. Rather, petitioner's primary contact with that state is the passive act of giving certain groups permission to perform copyrighted plays in exchange for royalties. So far as petitioner is aware, no prior case has addressed the question whether such activity subjects a foreign defendant to the jurisdiction of a state court. It is an important one, and should be resolved by this Court.

The purpose of the federal copyright system is, by securing a fair return for an author's creative labor, "to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp.* v. *Aiken,* —— U.S. ——, 45 L.Ed. 2d 84, 89 (1975). In furtherance of this goal, courts should not ignore the reality that "almost without exception, book publishers, motion picture and television producers, and record companies must rely upon a national, if not an international, market if they are to be successful." 1 M. Nimmer, The Law of Copyright, §1.1, at 4 (1975). By definition, therefore, a nationwide licensing system is essential in order for the private, and therefore the public, benefits of the copyright system to be realized. However, if copyright holders can be subjected to personal jurisdiction in every state in which their works are performed, their ability and inclination to license such performances will be greatly inhibited.[6] The many variations in local

[6] Cf. *Erznoznik* v. *City of Jacksonville,* —— U.S. ——, 45 L.Ed. 2d 125, 133 n.8, 135-36 (1975) in which this Court held that the expense of enclosing a drive-in movie screen was a substantial deterrent to the exercise of First Amendment rights.

law and taxation will entangle the owners of copyrights in a welter of complicated obligations to local laws and jurisdictions with whom they have no contacts or rights other than those conferred by the federal government's grant of a copyright.

These considerations cannot be ignored in determining whether petitioner is subject to personal jurisdiction in California. An analogous situation was presented in *New York Times Co.* v. *Conner,* 365 F.2d 565 (5th Cir. 1966) in which the Court of Appeals concluded that a newspaper's small circulation and sporadic reporting activities in Alabama prevented that state from asserting personal jurisdiction over it in a libel action. The Court distinguished a decision upholding Alabama long-arm jurisdiction over the manufacturer of an airplane which had crashed, observing:

> "There is, . . . a rational means of harmonizing the two decisions—First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity . . .
>
> "If this Court were to apply Elkhart literally to the commission of the tort of libel, newspapers with even one copy circulating within a state would conceivably be subjected to libel actions and the risk of large judgments at the hands of local juries incensed by the out-of-state newspapers' coverage of local events. In the face of this very real risk, could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of this liability?" 365 F.2d, at 572.

In subsequent decisions, the Fifth Circuit has maintained the position that First Amendment interests must be con-

sidered when a state seeks to acquire personal jurisdiction over a non-resident defendant in a libel action. *E.g., Rebozo* v. *Washington Post Co.*, 515 F.2d 1208, 1214-15 (5th Cir. 1975); *Edwards* v. *Associated Press*, 512 F.2d 258, 266-67 (5th Cir. 1975); *Curtis Publishing Co.* v. *Golino*, 383 F.2d 586, 592 (5th Cir. 1967).

In *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954), a Wilmington, Deleware department store made sales of merchandise to customers residing in nearby Maryland, who came to the store to make their purchases. Some of the customers received delivery of the merchandise at the store; in other cases, the goods were delivered to them in Maryland by common carrier or the store's trucks. Maryland sought to require the department store to collect its use tax on all sales to its residents, no matter how delivery was made. This Court held that the Maryland action violated the Due Process Clause.

Mr. Justice Jackson, writing for the majority, declared that:

> "Despite the increasing frequency with which the question arises, little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. *But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some*

> *minimum connection, between a state and the person, property or transaction it seeks to tax.*" 347 U.S. at pp. 344-45. (Emphasis supplied)

Here, petitioner's contacts with California are of the minimal sort which have persuaded courts in other cases to hold that a sufficient nexus for personal jurisdiction does not exist. However, this is no ordinary case. Even assuming for purposes of argument that a foreign corporation in petitioner's situation could be required to appear and defend a California personal injury action, the detrimental effect which such a result could have upon the functioning of the federal copyright (and patent) system must be taken into account in this case and service of process quashed. For if Califoria can impose such burdens, so can every other State, and so, indeed can every municipality, and every other political subdivision throughout the nation with power to impose sales and use taxes.

It may be anticipated that the State will argue that this is not a case involving out-of-state copyright licensing because petitioner in effect "leases" scripts, musical scores and dialogue material to its licensees. The short answer to this position is that, while the lending of musical scores, dialogue and script material is involved in petitioner's business, customers would be unwilling to enter into licensing agreements unless such material were made available. There is no way to confer upon a licensee the right to perform a musical show without delivering a script and musical scores to the licensee. This is also true in the case of a patent license. A patent owner can only license his patent by communicating technical data to a licensee who, by the license, has acquired the right to use the invention. Such technical data will always consist of drawings, books specifications and the like which are delivered to the licensee to make the grant of the intangible right (the patent or

the copyright) meaningful. Similarly, petitioner is doing only the minimal amount necessary to enable it to properly exploit its copyrights in interstate commerce; it is not engaging in separate "leasing" activities and the essential nature of its activities is not changed. Compare *Galgay* v. *Bulletin Co.*, 504 F.2d 1062, 1065 (2d Cir. 1974) (holding that certain activity, "while a necessary link" in a transaction, was "of minor or accidental importance."). The delivery of musical scores, scripts and dialogue material to the licensee merely constitutes communication of the nature of the copyright to the licensee.

C. The Fact That the California Court of Appeals' Opinion Was Not Published Should Not Affect This Court's Decision to Grant Review.

The opinion of the California Court of Appeal was certified "Not To Be Published," and therefore "shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, . . ." Rule 977, California Rules of Court. However, that fact should not affect this Court's decision to grant review. The Court of Appeal's judgment has deprived petitioner of a substantial constitutional right and could seriously disrupt its ability to exploit its federal copyrights. Moreover, the opinion reflects the views of three judges of the Appellate District in which the State of California is most likely to bring suits of this type, and therefore will have ramifications beyond the facts of this particular case.

In any event the question whether a state court "has decided a federal question of substance" within the meaning of Supreme Court Rule 19 is for this Court alone, and should not be usurped by the device of non-publication. A

local court's decision regarding the importance of a national issue should carry no more a presumption of correctness than its interpretation of the United States Constitution, and perhaps less. Indeed, a principal criticism of the unpublished opinion in California has been that it is used to dispose of significant questions in an almost casual way. One commentator, after reviewing unpublished opinions involving several unsettled areas of law, concluded:

> "The fond hope that non-publication . . . would remove from the reports only the cut-and-dried, old-hat reiterations of familiar rules, unworthy of researching or even occupying a lawyer's library shelf space, has in application proved to be unjustified. Imbedded in the bulk of unpublished opinions is a non-inconsiderable body of law dealing with novel points and giving rise to conflicts among decisions." Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 Cal. S.Bar. J. 387, 442-443 (1973).

See also Silverman, *The Unpublished Opinion in California*, 51 Cal.S.Bar J. 33 (1976); Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

In this case, petitioner is not asking this Court simply to perform an error-correcting function. The California Court of Appeal has decided an important question of federal law effecting both the Due Process Clause and the rights of copyright holders and its decision is wrong. The requirements of Rule 19 are fully satisfied and this Petition for Certiorari should be granted.

VI.

Conclusion

For the foregoing reasons, petitioner Tams-Witmark Music Library, Inc. respectfully requests that its Petition for a Writ of Certiorari be granted.

Dated: February 20, 1976

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of Court of Appeal of the State of California, Third Appellate District (Sacramento)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

(Sacramento)

3 Civil 15070

(Sup. Ct. #251136)

TAMS-WITMARK MUSIC LIBRARY, INC.,

Petitioner and Appellant,

v.

MUNICIPAL COURT, SACRAMENTO MUNICIPAL COURT DISTRICT, COUNTY OF SACRAMENTO,

Respondent.

BY THE COURT:

Petitioner appeals from a judgment by the superior court denying its petition for writ of mandate after denial by the Municipal Court, Sacramento Municipal Court District, of its motion to quash service of summons.

The statement of facts in the respondent's brief fairly summarizes the evidence and is incorporated by reference herein.

There is no merit to petitioner's contention that it has not had sufficient contacts with the state and cannot there-

fore be subject to the state's jurisdiction. Section 410.10 of the Code of Civil Procedure manifests the intent to allow the broadest possible exercise of jurisdiction, to be limited only by constitutional requirements of due process, i.e., "fair play and substantial justice." (Belmont Industries, Inc. v. Superior Court (1973) 31 Cal.App.3d 281, 285.) A foreign corporation may be required to defend in a California court when the quality and nature of its activity in the state in relation to a particular cause of action makes it fair to do so. (Buckeye Boiler Co. v. Superior Court (1969) 71 Cal.2d 893, 898.) And it has been held fair to subject a manufacturer to jurisdiction in California whenever the purchase or use of its product within the state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negative the existence of an intent on the manufacturer's part to bring about this result. (Buckeye Boiler Co. v. Superior Court (1969) 71 Cal.2d 893, 901-902.) The "use" of property includes the leasing of it. (Union Oil Co. v. State Bd. of Equal. (1963) 60 Cal.2d 441, 447.) In the case at bench, petitioner licenses its California customers to produce copyrighted musical plays. An integral part of this license is the lending to California residents, by mail, of musical and dialogue material to which petitioner retains ownership.

Under these circumstances, we find that petitioner used its product in California and had the requisite contacts with the state so as to subject itself to the state's jurisdiction. (See Union Oil Co. v. State Bd. of Equal., supra, 60 Cal.2d at p. 457; Rest., Conflict of Laws, Second, § 51.)

Since petitioner derives substantial economic benefits from its activity within the state, the contention that the state should not assume jurisdiction because it is not a

convenient forum is unavailing. (See Buckeye Boiler Co. v. Superior Court, supra, 71 Cal.2d at p. 900.)

The judgment is affirmed.

FOR THE COURT:

PUGLIA, *P.J.*

FRIEDMAN, *J.*

JANES, *J.*

APPENDIX B

Statement of Facts in the Respondent's Brief Incorporated By Reference in the Opinion of the Court of Appeal of the State of California, Third Appellate District (Sacramento)

STATEMENT OF THE FACTS

Tams-Witmark is a New York corporation engaged in the business of licensing amateur and professional organizations to produce copyrighted musical plays in return for the payment of royalties. In connection with this activity, Tams-Witmark furnishes sheet music and scripts, dialogue material, and anything else that is necessary to put on these musical plays.

Tams-Witmark obtains its customers through the mailing of advertising brochures to customers and potential customers. It also advertises in national drama magazines that have California circulation. The delivery and return of music and dialogue and other materials in connection with the licensing of productions are generally by mail. All business is conducted by telephone and through the mails with the orders accepted, either by telephone or mail, in New York since Tams-Witmark has no office or other place of business in California.

The price charged by Tams-Witmark does not include any breakdown between royalties for the permission to perform the plays and its charges for the various tangible personal property (materials) used in connection with such productions.

The present lawsuit arose as a result of the following events as set out in chronological order:

Appendix B

January 13, 1970—the Board of Equalization sent a letter to Tams-Witmark in New York advising it of a proposed estimated liability under the California Sales and Use Tax Law.

January 16, 1970—Danson and Hut, New York Attorneys for Tams-Witmark, disputed the Board of Equalization's claims as set out in the Board's letter.

March 13, 1970—Board of Equalization issued a notice of determination for additional taxes, interest and penalties against Tams-Witmark in the total amount of $19,025.86 for the period of August 1, 1965 to September 30, 1969.

April 10, 1970—Loeb and Loeb, Attorneys at Law, Los Angeles, California, advised the Board of Equalization that it will be representing Tams-Witmark regarding the proposed assessment. (Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

May 28, 1970—the law firm of Steinhart, Goldbert [sic], Feigenbaum and Ladar, Attorneys at Law, San Francisco, California, succeeded Loeb and Loeb as the new attorneys for Tams-Witmark. The law firm then prepared briefs in support of its petition for a redetermination of the tax as determined by the Board of Equalization. (Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

May 12, 1971—a hearing was heard before the State Board of Equalization Hearing Officer at San Francisco regarding the tax. Tams-Witmark was represented at the hearing by the Steinhart law offices. At the hearing the actual substance of the tax was discussed. (Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

January 5, 1972—after two postponements at the request of Tams-Witmark's attorneys, a hearing was held before the State Board of Equalization at the petitioner's request to redetermine the original tax that was assessed.

Appendix B

(Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

January 31, 1972—the State Board of Equalization, after considering the evidence which was presented before the hearing on January 5, 1972, issued a notice of determination redetermining the amount of tax, penalties and interest from $19,025.86 to $2,828.33. (Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

Thereafter, the Board of Equalization wrote to Tams-Witmark demanding that the amount of the redetermined tax be paid. However, Tams-Witmark not only failed to pay the demanded tax but also completely ignored all communications from the State Board of Equalization. As a result of Tams-Witmark's lack of cooperation and response, the present lawsuit was filed. (Affidavit of P. K. Taylor in Supplemental Clerk's Transcript.)

The present lawsuit inadvertently alleged a cause of action for sales taxes. However, in the lower court, petitioner and plaintiff orally stipulated that the complaint be deemed amended so that it be treated as alleging a cause of action for the collection of use taxes and this motion was argued and considered on this basis.

In effect, the Board of Equalization is seeking to collect use taxes, the liability for the collection of which was incurred by Tams-Witmark. The liability to collect use tax from California customers with respect to leases is described in Revenue and Taxation Code section 6203, *infra*, and will be discussed in greater detail in this brief.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102
NOV 25 1975

I have this day filed Order

HEARING DENIED

In re: 3 Civ. *No.* 15070

Tams-Witmark Music Library, Inc.

vs.

Municipal Court, Sacramento

Respectfully,

RECEIVED
NOV 26 1975

G. E. BISHEL
Clerk

Steinhart, Goldberg, Feigenbaum & Levar

BEST COPY AVAILABLE